

If tax due is not paid to a retailer, the taxpayer is required by Section 7 of the Electricity Excise Tax to file a return and make payment of the tax to the Department. See, 35 ILCS 630/7. (This is a PLR.)

May 3, 2000

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (See, <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of February 10, 2000. Review of your request for a Private Letter Ruling disclosed that all the information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to the FEDERAL CORPORATION for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither the FEDERAL CORPORATION or a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter you have stated and made inquiry as follows:

The purpose of this letter is to request a private letter ruling from the Illinois Department of Revenue as to the liability of the FEDERAL CORPORATION for Telecommunications Excise Tax and for Electricity Excise Tax. This ruling is being requested at the direction of John Roupas in connection with the FEDERAL CORPORATION's voluntary disclosure of potential liability for such taxes made December 28, 1999 and accepted by the Board of Appeals on January 14, 2000.

Background

Electricity Excise Tax— Current Leases

The FEDERAL CORPORATION owns an office building in downtown CITY. It uses most of the space in the building for its exempt purposes, but leases some of the space to commercial tenants. The FEDERAL CORPORATION provides electricity to all of its tenants. Under the leases, the FEDERAL CORPORATION charges all but one of the tenants a flat amount per square foot of leased space for electrical service during normal business hours. Section 8.04 of the standard lease provides in pertinent part:

During normal business hours (as stated in Section 8.01(a)) Tenant shall pay Landlord for electrical service at a rate of \$.60 per square foot of Premises per year plus applicable taxes. Additionally, Tenant shall pay directly to Landlord, for all such electrical current consumed relative to the Premises after normal business hours. The

after hours electrical usage shall be determined by an electrical survey conducted by the Landlord to determine an appropriate charge per square foot for electrical use consumed by Tenant. Landlord reserves the right, but is not obligated, to conduct a new survey on an annual basis or sooner if Tenant's electrical usage substantially changes. The per square foot rate charged to Tenant shall be the same rate Landlord is charged by the utility company without markup. . . .

Although the FEDERAL CORPORATION reserved the right to surcharge the tenants for electricity used outside of normal business hours, in practice, the FEDERAL CORPORATION has never made such a surcharge to its tenants. One tenant, a restaurant, is separately metered. The FEDERAL CORPORATION charges that tenant for electricity actually consumed. The FEDERAL CORPORATION's monthly invoices to tenants include a separate line for the fixed charge per square foot for electrical service. The FEDERAL CORPORATION has never charged or collected from its tenants Electricity Excise Tax.

Electricity Excise Tax—
Proposed Lease Amendments

The FEDERAL CORPORATION is in the process of amending its leases with its tenants to revise the terms under which it provides the tenants with electricity. Under the proposed amendments, the portion of section 8.04 of the lease quoted above would be replaced by the following:

Landlord shall provide Tenant with electricity for utilization by Tenant in the Premises for the operation of the lighting fixtures and the electrical receptacles installed in the Premises solely for the Tenant's normal business operations as specified in Section 6 of this Lease.

Under the proposed amendment, all electricity provided to tenants would be included in the base rental charged by the FEDERAL CORPORATION. The FEDERAL CORPORATION would have no right under the proposed lease to surcharge tenants for excess electricity usage, and would not be permitted to make any separately identifiable charge for electricity usage.

Telecommunications Excise Tax

The FEDERAL CORPORATION has permitted three of its tenants to use its telephone switch provided by Ameritech. In the case of two of its tenants, the FEDERAL CORPORATION charged the tenants an amount intended to recover its cost of the telephone service provided. The FEDERAL CORPORATION charged the third tenant a flat amount per telephone line per month. The FEDERAL CORPORATION's charges for telecommunications service were stated separately from its rental charges. The FEDERAL CORPORATION did not charge or collect from the tenants any telecommunications excise tax. One of those tenants now contracts directly with

Ameritech for its telecommunications service, and the FEDERAL CORPORATION expects the other tenant to do so by the end of the first quarter of 2000. The FEDERAL CORPORATION has never charged or collected Telecommunications Excise Tax from its tenants.

The FEDERAL CORPORATION's Federal Exemption

Under the United States Code, no state or local tax (other than a tax upon real estate) may be imposed on the FEDERAL CORPORATION.

RULINGS REQUESTED

1. The FEDERAL CORPORATION, under its existing leases with its tenants (other than the one separately metered tenant), is the user of the electricity, rather than a reseller, and therefore has no obligation to collect Electricity Excise Tax from those tenants.
2. The FEDERAL CORPORATION, under the amendments to its tenant leases that it intends to effect on or before March 31, 2000, is the user of the electricity, rather than a reseller, and therefore has no obligation to collect Electricity Excise Tax from those tenants.
3. The State may not require the FEDERAL CORPORATION to pay from its own funds Telecommunications Excise Tax or Electricity Excise Tax that it did not collect from its tenants.

Discussion

The FEDERAL CORPORATION Is The User Of The Electricity Under Its Existing Leases

Under its existing leases, the FEDERAL CORPORATION charges its tenants a specified amount per square foot as a base rental charge. In addition, the FEDERAL CORPORATION charges tenants a fixed amount per square foot as an additional rental charge intended to reimburse the FEDERAL CORPORATION for the electricity it uses in providing rental space to its tenants. The FEDERAL CORPORATION bears the full risk if the electricity consumed in the tenant spaces exceeds the amount that was anticipated in setting the fixed square foot charge, and reaps the entire benefit if the electricity consumed is less than anticipated. The FEDERAL CORPORATION also assumes the full benefit and burden of any changes in the price of electricity. Moreover, although the FEDERAL CORPORATION has reserved the right to surcharge tenants for electricity consumed outside normal business hours, the FEDERAL CORPORATION has never exercised that right and has therefore borne the entire cost of such service.

In the circumstances, the FEDERAL CORPORATION is not reselling electricity to its tenants; instead it is merely providing electricity as a necessary incident to the rental of space to its tenants. Although the FEDERAL CORPORATION makes a separate 'charge' for electricity, that is not determinative in this case. The charge for electricity is stated as a flat amount per square foot, the charge does not vary with actual consumption by the tenant, and the charge does not vary with changes in the price of electricity. In substance, the charge is not a charge for electricity at all, but is merely an additional rental amount. The FEDERAL CORPORATION is properly viewed as the user of the electricity provided to its tenants and not as a reseller; therefore, the FEDERAL CORPORATION is not required to collect Electricity Excise Tax from its tenants.

The FEDERAL CORPORATION Will be The User Of Electricity
Under Its Leases As Amended

Under its leases, as the FEDERAL CORPORATION expects them to be amended prior to March 31, 2000, the FEDERAL CORPORATION will provide electricity to its tenants (including the tenant that is currently separately metered until such time as that tenant can become a direct customer of Commonwealth Edison Company) as part of the base rental amount with no separate charge for electricity consumed by the tenants. The FEDERAL CORPORATION will continue to bear the full benefit and burden if the tenants' electricity consumption varies from that expected in setting the base rental amount or if there are any changes in the price of electricity. Under the proposed amendment, the FEDERAL CORPORATION is properly viewed as the user, rather than a reseller, of electricity to its tenants.

The State May Not Require The FEDERAL CORPORATION To Pay
Uncollected Taxes Out Of Its Own Funds

The Telecommunications and Electricity Excise Taxes are imposed on the purchasers of the telecommunications service and the electricity. In the event it is determined that the FEDERAL CORPORATION is reselling, rather than using, the telecommunications service or electricity, the tax would be imposed on the FEDERAL CORPORATION's tenants and the FEDERAL CORPORATION would, under Illinois law, be required to collect the tax from the tenants and remit it to the Department of Revenue. In this case, the FEDERAL CORPORATION has not collected either tax from its tenants. If the FEDERAL CORPORATION were now required to pay the tax to the Department, it would have to do so out of its own funds, which, in effect, would be a direct tax on the FEDERAL CORPORATION.

The United States Code exempts the FEDERAL CORPORATION from state and local taxes, except real estate taxes. Specifically, that section provides:

In accordance with this section, not tax may be imposed directly on the FEDERAL CORPORATION. Any requirement that the FEDERAL CORPORATION pay out of its

own funds taxes that it has failed to collect would result in a prohibited tax on the FEDERAL CORPORATION. The exemption would be rendered superfluous if it could be avoided by requiring the FEDERAL CORPORATION to pay a tax technically imposed on another person. As such, the FEDERAL CORPORATION cannot be made to pay the Telecommunications and Electricity Excise Taxes that it has not collected from its tenants.

Procedural Statements

Tax Period at Issue

The tax period at issue is 1996-2000.

Pending Audit or Litigation

The taxpayer has no audit or litigation pending with the Department. As noted above, however, this ruling is being filed in connection with a voluntary disclosure application to the Board of Appeals.

The Department Has Not Previously Ruled

To the best of the knowledge of the taxpayer and of the undersigned, the Department has not previously ruled on the same or a similar issue for the taxpayer or a predecessor, nor has the taxpayer or any representative of the taxpayer previously submitted the same or a similar issue to the Department but withdrawn it before the letter ruling was issued.

Contrary Authorities

The undersigned is unaware of any authorities contrary to the views expressed herein.

Power of Attorney

A Power of Attorney authorizing the undersigned to represent the FEDERAL CORPORATION in this matter is on file with the Board of Appeals. A copy of the Power of Attorney is attached.

Deletions Statement

A deletions statement is attached as Appendix A.

Conclusion

In sum, the FEDERAL CORPORATION is the consumer of electricity provided to its tenants under the existing leases and will be the consumer of the electricity provided to

its tenants under the proposed amendments to the leases. Moreover, to the extent the FEDERAL CORPORATION is deemed to be a reseller of either electricity or telecommunications service, the State may not require the FEDERAL CORPORATION to pay a tax out of its own funds that it failed to collect from its tenants.

Please call me if you have any questions or if you need any additional information.

In respect to the first ruling which you request, we are unable to conclude that the FEDERAL CORPORATION is the user of electricity, rather than a reseller. The "Current Lease" provisions which are cited in your letter clearly indicate that the Corporation makes a specific charge to its tenants for electrical service. Section 8.04 of the "standard lease" provides, for instance, that the "[t]enant shall pay Landlord for electrical service at a rate of \$.60 per square foot of Premises per year plus applicable taxes," and that "[t]he per square foot rate charged to Tenant shall be the same rate Landlord is charged by the utility company without markup ..." Clearly, the Corporation has chosen to resell electricity obtained from a utility company.

As you know, the Electricity Excise Tax Law ("Law")(35 ILCS 640/1 et seq.) imposes a tax upon the privilege of using in this State electricity purchased for use or consumption and not for resale. See, Section 2-4 of the Law (35 ILCS 640/2-4). Under Section 2-7 of the Law, the tax is required to be collected from users by delivering suppliers maintaining a place of business in Illinois. The provisions of Section 2-8 of the Law state that the tax "required to be collected by any delivering supplier maintaining a place of business in this State ... shall constitute a debt owed by that person to this State ..." See, 35 ILCS 640/2-8. In other words, delivering suppliers that are required to collect the tax and fail to do so become liable for that tax.

Although we believe that the Corporation has structured its current leases in such a way that it is a delivering supplier of electricity, we are unable to conclude that it can be held liable for the uncollected Electricity Excise Tax that has accrued since August 1, 1998. We base this conclusion upon the provisions of 12 U.S.C. 531. As your letter notes, the provisions of 12 U.S.C. 531 state that "Federal reserve banks ... shall be exempt from Federal, State and local taxation, except taxes upon real estate." Although the incidence of the tax imposed by the Law falls upon users of electricity, delivering suppliers who fail to collect and remit that tax can be held liable for it. We believe that the provisions of 12 U.S.C. would be contravened were the Department to hold the Corporation liable for the uncollected Electricity Excise Tax which has accrued since August 1, 1998.

We wish to point out, however, that the Corporation's tenants may still be held liable for the unpaid tax. As indicated above, the tax is imposed upon the user of electricity, and collected by a delivering supplier. Section 2-7 of the Law provides that "[w]here a delivering supplier does not collect the tax from a purchaser, other than a self-assessing purchaser as provided herein, such purchaser shall pay the tax directly to the Department." See, 35 ILCS 640/2-7.

We have examined the "Proposed Lease Amendments" recited in your letter. These amendments state that the

[l]andlord shall provide Tenant with electricity for utilization by Tenant in the Premises for the operation of the lighting fixtures and the electrical receptacles installed in the Premises solely for the Tenant's normal business operations as specified in Section 6 of this Lease.

We do not know the manner in which "normal business operations" are defined in Section 6 of the lease, since that provision was not included with your ruling request. You state, however, that "all electricity" provided to tenants would be included in the base rental charge made by the Corporation," and that the Corporation "would have no right under the proposed lease to surcharge tenants for excess electricity usage, and would not be permitted to make any separately identifiable charge for electricity usage." To the extent that all the electricity used by tenants is included in the base rental charged them by the Corporation, we would agree that the Corporation is the user, rather than a reseller, of electricity. Because of the exemption conferred by 12 U.S.C. 531, we believe that the Corporation's purchase of electricity for provision to its tenants under such a lease is exempt from Electricity Excise Tax.

The final ruling that you request seeks a determination that "[t]he State may not require the Federal Corporation to pay from its own funds Telecommunications Excise Tax or Electricity Excise Tax that it did not collect from its tenants." As noted above, we believe that this conclusion is correct for purposes of the Electricity Excise Tax Law. For similar reasons, we believe the same conclusion must be drawn for liability under the Telecommunications Excise Tax Act ("Act").

The Telecommunications Excise Tax is imposed at the rate of 7% of the gross charge for the act or privilege of originating or receiving interstate and intrastate telecommunications in this State purchased at retail from a retailer. See, 35 ILCS 630/3 and 630/4. The tax is imposed upon consumers of telecommunications, and must be collected from them by retailers maintaining a place of business in Illinois. See, 35 ILCS 630/5. Section 5 of the Act states that "[t]he tax required to be collected by this Article and any such tax collected by such retailer shall constitute a debt owed by the retailer to this State." See, 35 ILCS 630/5.

The "standard lease" recited in your letter does not contain specific provisions regarding the provision of telecommunications by the Corporation to its tenants. However, information submitted does indicate that the Corporation charged one tenant a flat amount per telephone line per month (charged separately from its rental charges). In the case of two other tenants, the Corporation allowed them to use its telephone switch and charged them an amount intended to recover the cost of the service provided. These charges, too, were separately stated from the rental charges. Under Section 2 of the Act, a telecommunications retailer is a person who is engaged in the business of supplying or furnishing telecommunications and all services and equipment provided in connection therewith for a consideration to persons other than the Federal and State governments. In our opinion, the Corporation was engaging in activities consistent with those of a telecommunications retailer.

While we view the Corporation as a telecommunications retailer, we are unable to conclude that it can be held liable for accrued Telecommunications Excise Tax. We base this conclusion upon the provisions of 12 U.S.C. 531. As your letter notes, the provisions of 12 U.S.C. 531 state that

"Federal reserve banks ... shall be exempt from Federal, State and local taxation, except taxes upon real estate." Although the incidence of the tax imposed by the Act falls upon telecommunications consumers, telecommunications retailers who fail to collect and remit the tax can be held liable for it. We believe that the provisions of 12 U.S.C. would be contravened were the Department to hold the Corporation liable for the uncollected Telecommunications Excise Tax.

We again wish to point out, however, that the Corporation's tenants may still be held liable for unpaid tax. As indicated above, the tax is imposed upon the user of telecommunications, and collected by telecommunications retailers. Section 7 of the Act provides that "[w]hen a taxpayer does not pay the tax imposed by this Article to a retailer, such taxpayer shall file a return with the Department and pay the tax upon that portion of gross charges so paid to the retailer during the preceding calendar month ..." See, 35 ILCS 630/7.

I hope that this information is helpful. If you have further questions about this letter ruling, please do not hesitate to contact me at 217/782-2844. For additional questions about the Illinois sales tax laws, you may access the Department's Web site at www.revenue.state.il.us.

Very truly yours,

Jerilynn T. Gorden
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JTG:msk